



# Commonwealth of Massachusetts

## State Ethics Commission

One Ashburton Place, Room 619, Boston, MA, 02108  
phone: 617-727-0060, fax: 617-723-5851



Walter Hewitson  
45 Crescent Drive  
Bridgewater, MA 02324

### **PUBLIC ENFORCEMENT LETTER 98-1**

Dear Mr. Hewitson:

As you know, the State Ethics Commission ("Commission") has conducted a preliminary inquiry into allegations that you violated the state conflict of interest law, G.L. c. 268A, by receiving compensation from or acting as an agent for private parties in relation to Bridgewater Conservation Commission matters. Based on the staff's inquiry (discussed below), the Commission voted on January 15, 1997, that there is reasonable cause to believe that you violated the state conflict of interest law, G.L. c. 268A, §17(a) and (c). The Commission, however, does not believe that further proceedings are warranted. Instead, the Commission has determined that the public interest would be better served by bringing to your attention, and to the attention of the general public, the facts revealed by the preliminary inquiry and by explaining the application of the law to such facts, with the expectation that this advice will ensure your understanding of an future compliance with the conflict of interest law. By agreeing to this public letter as a final resolution of this matter, you do not admit to the facts and law discussed below. The Commission and you have agreed that there will be no formal action against you in this matter and that you have chosen not to exercise your right to a hearing before the Commission.

#### **I. Facts**

1. You were, during the time relevant, a member of the Bridgewater Conservation Commission ("Conservation Commission").

2. You were, during the time relevant, a wetlands botanist who performed wetlands delineations for individuals and businesses for a fee.

3. Between August 1991 and April 1995, as a consultant to engineering firms and to individual property owners, you prepared approximately 38 wetland delineation reports, most of which you knew would be submitted to the Conservation Commission in connection with various applications to the commission.<sup>1/</sup> Your signature on your reports identifies you as a "Ph.D. in Botany." You were a member of the Conservation Commission at the time you prepared these reports.

4. On February 25, 1995, the Conservation Commission held an on-site review regarding a six-house subdivision known as Four Leaf Circle. Certain abutters and other nearby property owners had complained that the wetlands boundaries were too narrow in scope, and should be broadened to exclude two additional buildable lots.<sup>2/</sup> You were at the site review at the request of the engineer who hired you to delineate the wetlands. You made a presentation to those in attendance at the site review, defending why you flagged the wetlands in the manner you did. (You had done the wetlands delineation for this subdivision on September 7, 1994.)

5. You were compensated for performing the wetlands delineation for the Four Leaf Circle subdivision.

6. You abstained as a Conservation Commission member whenever a matter came before the Conservation Commission which involved a delineation you had done.

## II. Discussion

As a Conservation Commissioner you were a municipal employee as that term is defined in G.L. c. 268A, §1. General Laws c. 268A, §17(a) prohibits a municipal employee, otherwise than in the proper discharge of his official duties, from receiving compensation from any one other than the town in relation to any particular matter in which the town is a party or has a direct and substantial interest. General Laws c. 268A, §17(c) prohibits a municipal employee, otherwise than in the proper discharge of his official duties, from acting as agent for a private party in connection with any particular matter in which the town is a party or has a direct and substantial interest.

Determinations of and decisions regarding orders of conditions are particular matters in which the town has a direct and substantial interest. Most of the 38 wetlands delineation reports prepared by you were submitted to the Conservation Commission in connection with the commission making determinations of non-applicability and issuing orders of conditions. Therefore, the reports submitted were “in relation to” those particular matters. In addition, the Four Leaf Circle site visit on February 25, 1995, was obviously in relation to the determination of non-applicability that was pending before the Commission regarding that development. You received compensation for submitting these reports.<sup>3/</sup> In submitting these reports you were acting as an agent for your clients.

By preparing for compensation wetlands delineations reports that you knew would likely be submitted to the Conservation Commission and which, in fact, were submitted to that commission, you received compensation from someone other than the Town of Bridgewater in relation to particular matters in which the town had a direct and substantial interest.<sup>4/</sup> Therefore, there is reasonable cause to believe you violated §17(a).<sup>5/</sup> *See, e.g., Townsend, Jr., 1986 SEC 276* (disposition agreement in which Conservation Commission member pays \$1,000 fine for violating §17(a) and (c) by acting as a paid engineer on behalf of private client in relation to Conservation Commission matters.)

In addition, by preparing wetlands delineation reports which you knew would likely be submitted to the Conservation Commission with your name appearing as the author, and by appearing on behalf of your client at the February 25, 1995 site review, you acted as agent for someone other than the Town of Bridgewater in relation to particular matters in which the town had a direct and substantial interest. Therefore, there is reasonable cause to believe you violated §17(c).

By way of defense, you note that before doing wetlands delineations in Bridgewater, you asked the Conservation Commission chairman and agent, respectively, how the conflict of interest law would apply to your doing wetland delineations for private clients. From these conversations it was your understanding that you could submit your reports to the Conservation Commission for their review, however, you could not participate as a conservation commission member in any matters that came before it where you had done the wetlands delineation for the applicant. Further, you also understood that you could not represent clients before the Conservation Commission or use your position to obtain a favorable result for a client.

The advice you received regarding your submitting reports was incorrect. As the State Ethics Commission has observed on several occasions, reliance on incorrect advice is not a defense unless the advice is given by town counsel and approved by the Commission. Good faith reliance on incorrect advice can, however be a mitigating factor. *Lavoie, 1987 SEC 286, 289*. You should have been advised that even if you abstained from participating as a Conservation Commission member, and even if you did not appear before the Commission in person on behalf of a private client, your doing the delineations and your submitting your reports would, nevertheless, violate §17(a).

## III. Disposition

The Commission is authorized to resolve violations of G.L. c. 268A with civil penalties of up to \$2,000 for each violation. The Commission chose to resolve this case with a public enforcement letter, rather than pursuing a formal order which might have resulted in a civil penalty, because the vast majority of your conduct—doing the 38 delineations and submitting the reports—involved an issue the Commission has not previously publicly addressed and which is subtle; namely, whether delineations and reports of delineations are in relation to a Conservation

Commission particular matter even though the delineator does not necessarily know that the report will be submitted to the Conservation Commission. (As discussed above, with the publication of this letter we are making clear that we will conclude that the delineation and report are “in relation to” a particular matter in which the town has a direct and substantial interest if the delineator knew it was likely that the report would be so submitted unless the report is not filed with the Conservation Commission or the delineator obtained an assurance from the client that no such filing was contemplated.)

Based upon its review of this matter, the Commission has determined that your receipt of this public enforcement letter should be sufficient to ensure your understanding of an future compliance with the conflict of interest law.

This matter is now closed.

**DATE: August 13, 1997**

<sup>1</sup>More than half of the above 38 wetlands delineation reports were submitted to the Conservation Commission. They were submitted either for the purpose of a determination of non-applicability (i.e., a decision that the project did not involve wetlands or any area within 100 feet of wetlands) or to obtain an order of conditions (a decision as to the conditions under which construction may occur in wetlands or in the 100 foot buffer zone). From your attendance at Conservation Commission meetings, you had knowledge that the majority of your reports were being filed with the Commission.

<sup>2</sup>The loss of these additional lots might have made the project commercially unfeasible for the developer.

<sup>3</sup>The evidence is unclear as to whether your original fee for doing the Four Leaf Circle wetlands delineation included any defense of that delineation which might later become necessary, such as at a site review. You stated that in the case of a single lot homeowner, any such subsequent defense typically is part of the original fee, whereas you generally charge an additional fee if a subdivision is involved. As to the Four Leaf Circle delineation, you stated that because it involved a subdivision as opposed to a single lot, you would have ordinarily charged a separate fee for your site review appearance. Nevertheless, in this instance, you did not submit an additional bill because you were satisfied in simply proving that your critics were in error. Obviously, if you had charged an additional fee for this site review, that too would be compensation in relation to the particular matter in which the town had a direct and substantial interest.

<sup>4</sup>In order to act as an agent it is not necessary to personally appear before a board. It is sufficient to correspond with a board on behalf of a third party or sign a report or stamp a plan on behalf of a third party knowing that the report or plan will be filed with the board.

<sup>5</sup>Where a public official is privately employed as a professional, such as a botanist, engineer, or surveyor, and is asked as such a professional to prepare a report which he knows or reasonably should know is likely to be submitted to a board, agency or commission in his own town, the public official has a duty to inquire as to whether the report will be so submitted.

If the answer to the inquiry is yes, as discussed above, the public official will generally be barred by §17 from accepting the job. (There are some exceptions for special municipal employees.) If the public official fails to make the inquiry, he will be deemed to violate §17 if the report is, in fact, so submitted.